

to brief for 206
argued by P.E.
April 20/27
G.S.

19

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1926

No. 983

**THE UNITED STATES OF AMERICA, PLAINTIFF IN
ERROR**

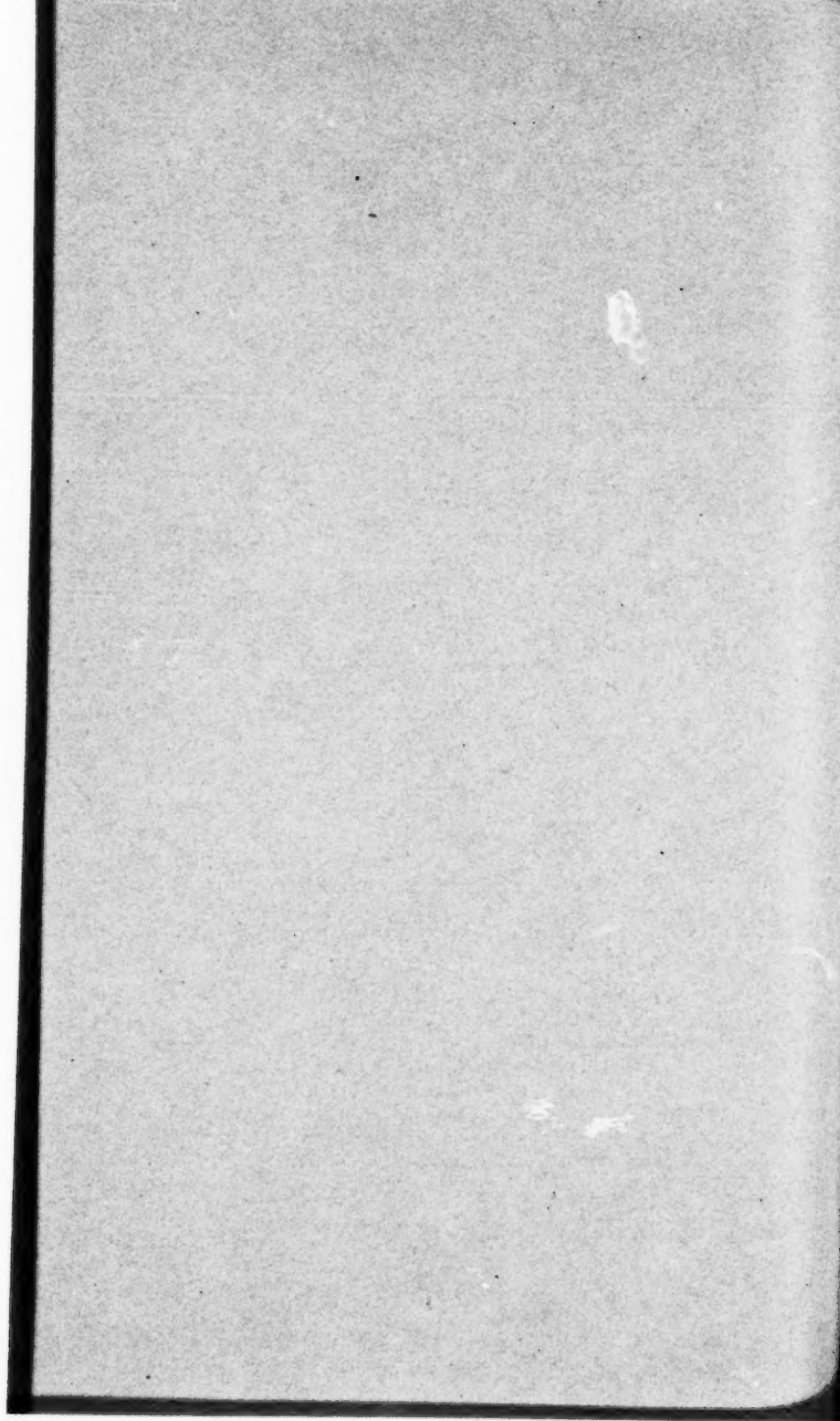
VS.

D. J. ALFORD

**IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF FLORIDA**

FILED MARCH 7, 1927

(32550)



SUPREME COURT OF THE UNITED STATES

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vs.

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A In United States District Court

Northern District of Florida

Writ of error and return

March 3, 1927

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Judge of the District Court of the United States for the Northern District of Florida, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, and of a plea which is in said District Court of the United States for the Northern District of Florida, before you, between the United States of America and D. J. Alford, a manifest error hath happened to the great damage of the said United States of America as is said and appears by the complaint, we, being willing that said error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in that behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings, with all things concerning the same, to the Supreme Court of the United States, at the court room of said court, in Washington, D. C., together with this writ, so that you have the same, at the said place before the judges aforesaid, on the 31st day of March, 1927, next, with the record and proceedings aforesaid being duly inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right and according to law and the custom of the United States ought to be done.

Witness the honorable William Howard Taft, Chief Justice of the Supreme Court of the United States, this 3rd day of March, A. D. 19—.

[SEAL.]

F. W. MARSH,
*Clerk of the ——— of the
United States for the Northern District of Florida.*

The foregoing writ was allowed 24th day of February, A. D. 1927.

By WM. B. SHEPPARD, *Judge.*

Return to writ of error

The foregoing writ of error was this day served by lodging with the filing in the office of the clerk of said court a duly certified copy of the foregoing writ of error, for the defendant in error, and by transmitting herewith the original record and proceedings as herein commanded.

Witness my hand and seal of said court on the day and date within tested.

[SEAL.]

F. W. MARSH, *Clerk.*

B [Citation in usual form showing service on Philip D. Beall filed March 3, 1927, omitted in printing.]

C In United States District Court

UNITED STATES OF AMERICA

VS.

D. J. ALFORD

Bill of indictment

Filed May 12, 1925

1 UNITED STATES OF AMERICA,
Northern District of Florida, ss:

In the District Court of the United States in and for Northern District aforesaid, at the May term thereof, A. D. 1925.

The grand jurors of the United States, impaneled, sworn, and charged at the term aforesaid, of the court aforesaid, on their oath present, that D. J. Alford, on the 10th day of March, in the year 1924, in the said division of said district and within the jurisdiction of said court unlawfully, wilfully, and feloniously caused to be set on fire certain grass, underbrush, and timber growing and being upon the public domain of the United States, to wit, upon section 12 in township 2 north, range 23 west of Tallahassee meridian, and did leave and suffer said fire to burn unattended near said timber and inflammable material, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

2 And the grand jurors aforesaid, on their oath aforesaid, do further present that the said D. J. Alford, on the 10th day of March, in the year 1924, in the said division of said district and within the jurisdiction of said court, did unlawfully build a fire near inflammable grass and other inflammable material and timber situated upon the public domain and lands of the United States, to wit, near lands of the United States located on section 12 in township 2 north, range 23 west of Tallahassee meridian, and before leaving said fire so built by him did not totally extinguish the same, whereby by reason of his said failure to so extinguish said fire the inflammable grass and other material on the said lands comprising a part of the public domain was burned and destroyed, contrary to

the form of the statute in such case made and provided, and against the peace and dignity of the United States.

FRED CUBBERLY,
United States Attorney.

J. H. SHERRILL,
Foreman of the Grand Jury

[File endorsement omitted.]

Whereupon said indictment was ordered filed and docketed.

In United States District Court

[Title omitted.]

Demurrer filed

May 13, 1925

Comes now the defendant and demurs to the 2 count of the indictment herein, numbered #2184, and says same is bad in law in substance, and for grounds of said demurrer says:

1. That said court states no offense against the laws of the United States.

2. That said statute does not cover the building or leaving of fires at any place except upon a forest reservation.

3. That if said statute attempts to cover fires upon any place other than a forest reservation, same is unconstitutional and void.

4. That said count states no offense against the United States.

5. That said count states no facts constituting any offense against the United States.

PHILLIP D. BEALL,
Attorney for Defendant.

[File endorsement omitted.]

In United States District Court

[Title omitted.]

Judgment 1

Filed March 3, 1927

This cause is before me upon demurrer of the defendant to the second count of the indictment numbered 2184. This count is based upon section 53 of the Penal Code, which said section reads as follows: "Whoever shall build a fire in or near any forest, timber, or other inflammable material upon the public domain or upon any Indian reservation, or lands belonging to or occupied by any tribe

of Indians * * * shall before leaving said fire totally extinguish the same; and whoever shall fail to do so shall be fined not more than \$1,000 or imprisoned not more than two years or both."

The second count of the indictment alleges that the defendant on the 10th day of March, 1924, did unlawfully build a fire near inflammable grass and other inflammable material and timber situated upon the public domain and lands of the United States, to wit, near lands of the United States located in a certain section and before leaving said fire so built by him did not totally extinguish the same, whereby and by reason of his failure to so extinguish said fire the inflammable grass and other material on lands comprising a part of the public domain was burned and destroyed.

From the allegations of this count of the indictment it appears that the defendant is charged with building a fire near inflammable grass, situated upon the public domain, but not directly upon the public domain. That he did not totally extinguish the fire before leaving it, and by reason of his failure to extinguish the fire, upon leaving the same, inflammable grass and other material on the public domain was burned and destroyed. In other words, and it is so conceded in the argument, the defendant built a fire on lands other than the public domain but near by and failed to extinguish the same and the fire spread and burned not only the inflammable material upon privately owned lands but spread to and burned the grass and inflammable material situated upon the public domain.

Section 53 of the Penal Code states that: "Whoever shall build a fire in or near any forest, timber, or other inflammable material upon the public domain, etc., shall before leaving said fire totally extinguish the same." This requires a construction of the meaning of the words of the statute. It is contended by the Government that if the defendant, as charged, built a fire on privately owned lands near to the public domain and by his failure to extinguish the same the fire spread through the woods and communicated itself to grass or inflammable material upon the public domain, that he has violated the statute, although the fire was originally set out upon privately owned lands, and that the statute is intended to cover this state of facts. I do not agree with this construction of the statute, and in my mind the meaning of the word "near" as contained in section 53 of the Penal Code is taken in connection with the words "shall build a fire, near," etc., means building a fire upon the public domain itself near inflammable material on the public domain and not upon lands near by that may be privately owned. Therefore, from this construction of the statute, it is my opinion that the demurrer to the second count of the indictment should be sustained and it is so ordered.

The United States attorney desiring to have the question of this construction of the statute reviewed under authority of the criminal appeals act, it is, therefore, further ordered upon the sustaining of the foregoing demurrer to the second count of

the indictment and the United States of America having presented it assignment of error upon the ruling, that the United States be, and is hereby, allowed a writ of error from the Supreme Court of the United States to this court under and by authority of the criminal appeals act.

Done and ordered this 24th day of February, A. D. 1927.

WM. B. SHEPPARD,
Judge.

[File indorsement omitted.]

8 In United States District Court

[Title omitted.]

Assignments of error

Filed March 3, 1927

Now comes the United States of America, by Fred Cubberly, its attorney, and in connection with its petition for a writ of error makes the following assignment of error which it alleges appears in the order and ruling of the court upon the demurrer to the second count of said indictment.

1. The court erred in its construction of the statute (section 53, Penal Code) in sustaining the demurrer to the second count of the indictment.

2. The court erred in the judgment upon the construction of the statute and in sustaining the demurrer to second count of the indictment herein.

FRED CUBBERLY,
United States Attorney.

Filed before me this 24th day of February, 1927.

WM. B. SHEPPARD, ,
Judge.

[File endorsement omitted.]

9 In United States District Court

[Title omitted.]

Petition for writ of error and order allowing same

Filed March 3, 1927

Now comes the United States of America, plaintiff in the above cause, by its attorneys, and says that on this day the court entered judgment herein against the plaintiff upon argument of demurrer to the second count of the indictment herein based upon a construction of the statute in such cases made and provided, which said judg-

ment error has been committed to the prejudice of the plaintiff as will more fully appear by the assignment of errors which is filed with this petition.

Wherefore this plaintiff prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of the errors so complained of as provided for in the criminal appeal act of Congress, and that a transcript of the record, proceeding, and papers in this cause duly authenticated may be sent to the Supreme Court of the United States aforesaid.

FRED CUBBERLY,
Attorney for Plaintiff.

The foregoing petition is hereby granted and the clerk directed to issue writ of error.

This February 24th, 1927.

WM. B. SHEPPARD,
Judge.

10 [Writ of error and return omitted. Printed side page A, ante.]

12 [Citation and service omitted. See note printed side page B, ante.]

13 In United States District Court

[Title omitted.]

Procipe for transcript of record

Filed March 3, 1927

To the clerk of the above court:

You will please make up and properly authenticate the record in the above cause for transmittal to the Supreme Court of the United States in obedience to the writ of error issued this day upon the allowance thereof by the Honorable William B. Sheppard, district judge, and entered in said record the following papers and documents:

- (1) The indictment No. 2184.
- (2) Demurrer to indictment filed May 12th, 1925.
- (3) Order and judgment on demurrer dated February 24, 1927.
- (4) Assignment of errors.
- (5) Petition for writ of error and allowance thereof.
- (6) Writ of error.
- (7) Citation and acceptance of service thereon.

FRED CUBBERLY,
United States Attorney.

I hereby acknowledge service of a copy of the foregoing direction to the clerk to make the record in the above proceeding and

do hereby enter an appearance herein for the defendant in error, D. J. Alford, and said direction being complete no paper or documents for said record are requested by me.

PHILIP D. BEALL,

Attorney for Defendant in Error, Pensacola, Florida.

Dated March 3rd, 1927.

[File endorsement omitted.]

14 [Clerk's certificate to foregoing transcript omitted in printing.]

d Supreme Court of the United States

Statement of points to be relied upon and designation by plaintiff in error to print entire record

Filed March 31, 1927

The plaintiff in error intends to rely upon the contentions that the district court erred in sustaining, upon the following grounds, the demurrer to the second count of the indictment:

(1) That section 53 of the act of March 4, 1909, chapter 321, 35 Statutes at Large, page 1080, as amended by the act of June 25, 1910, 36 Statutes at Large, page 855, at page 857, does not cover the building or leaving of fires at any place other than on lands of the United States.

(2) That if said section 53 of the act of March 4, 1909, chapter 321, 35 Statutes at Large, page 1080, as amended by the act of June 25, 1910, 36 Statutes at Large, page 855, at page 857, be construed to include fires built upon or left upon lands other than lands of the United States, said statute is unconstitutional and void.

The plaintiff in error thinks that the entire record as filed will be necessary for the consideration of the claimed errors above enumerated.

WILLIAM D. MITCHELL,

Solicitor General.

MARCH 31, 1927.

Service of a copy of the foregoing statement of points is hereby acknowledged this ——— day of ———, 1927.

e [File indorsement omitted.]